

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-1345

GARY SEAL,

APPELLANT

V.

RYDER INTEGRATED SERVICES,
INC., RYDER SERVICES, INC., & AIG
CLAIM SERVICES, INC.,

APPELLEES

Opinion Delivered April 29, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [NO. F400831,
F412571]

AFFIRMED

DAVID M. GLOVER, Judge

This is a workers' compensation case. Appellant, Gary Seal, sustained a compensable right-shoulder injury on January 9, 2004, while working for appellee Ryder Integrated Logistics, Inc. (Respondent No. 1). The instant case involves an additional claim for benefits concerning the same right shoulder. Appellant claims alternatively, either that his right-shoulder troubles were a recurrence of his January 9, 2004 injury, making Ryder responsible, or that on August 9, 2004, he sustained an aggravation of his pre-existing injury or a new compensable injury, making appellee Meyer's Bakeries (Respondent No. 2) responsible. The ALJ concluded that appellant did not prove his case and denied and dismissed his claim. The Commission affirmed and adopted the ALJ's decision. This appeal/cross-appeal followed. For his sole point of appeal, appellant contends that whether his right-shoulder injury was classified as a recurrence, an aggravation, or a new injury, he proved every element necessary

to establish compensability and the Commission's contrary conclusion was not supported by substantial evidence. In its cross-appeal, Meyer's Bakeries contends that "to the extent claimant's problems are not deemed to be related to his job duties in Iraq or some other cause, appellant's problems are a recurrence and/or a compensable consequence of the January 2004 injury appellee/cross-appellant No. 1 accepted as compensable." We affirm on direct appeal, and, therefore, find it unnecessary to address Meyer's Bakeries' cross-appeal.

Background

Appellant began working for Meyer's Bakeries in 1996. In 2003, appellee Ryder was contracted to handle the trucking portion of Meyer's Bakeries' business and appellant thereby became a Ryder employee, driving an 18-wheeler and delivering bakery products. On January 9, 2004, appellant sustained an admittedly compensable injury to his right shoulder while working for Ryder. Even though it was treated as compensable by Ryder and appellant received some medical treatment and returned to work before the end of January 2004, appellant testified that he continued to have problems with his shoulder and that he obtained additional medical treatment through his group-health plan. It was stipulated that appellant's employment with Ryder ended and he was back on Meyer's Bakeries' payroll on March 15, 2004, performing essentially the same tasks.

On August 6, 2004, an MRI of his right shoulder showed the following:

- 1) Increased signal is seen within the distal aspect supraspinatus tendon near the insertion of the humeral head consistent with tendinosis. *No rotator cuff tear is seen.*
- 2) Mild degenerative changes at the Acromioclavicular joint.

(Emphasis added.) On August 9, 2004, appellant was working for Meyer's Bakeries in Florida when he fell about three feet as a result of his right shoulder coming out of its joint. He testified that he waited until he returned to Arkansas to report the incident, at which time he saw Dr. Charles Marrow on August 13, 2004. Dr. Marrow took him off work and sent him to physical therapy. The doctor released appellant to return to work on October 6, 2004; appellant resumed his duties with Meyer's Bakeries. Appellant stated that his right-shoulder problems continued and that he had to pay people to help him unload his truck.

On February 16, 2005, appellant underwent an independent medical evaluation by Dr. David Collins, who concluded that he had aggravated his January 9, 2004 injury. Dr. Collins relied in large part upon the fact that appellant's August 6, 2004 MRI showed no rotator-cuff tear, and that on August 9, 2004, he had fallen in Florida. According to appellant, he quit his job around this time because Meyer's Bakeries had been sold to Southern Bakeries and Southern was going to drop his pay. Appellant stated that he went to work for Tyson Foods, but left after about a week because Tyson required him to drive too many hours. He acknowledged that he was not truthful about his prior medical condition in applying for the Tyson job because he was afraid he would not get the job. After leaving Tyson, appellant began working for Haliburton in Iraq as a truck driver in late June 2005. He acknowledged that he was also not truthful with Haliburton concerning his right-shoulder problems.

On August 28, 2005, appellant sustained a left-shoulder injury while working for Haliburton. The left-shoulder injury is not related to the instant case except for the fact that in the process of being treated for his left-shoulder injury, appellant mentioned his right-

shoulder problems to Dr. C. Chris Alkire. Dr. Alkire ordered another MRI of the right shoulder, which was performed on October 23, 2006. That MRI showed:

IMPRESSION:

1. HIGH GRADE PARTIAL THICKNESS TEAR OF THE DISTAL ANTERIOR FIBERS OF THE SUPRASPINATUS AT THE LEVEL OF THE FOOTPLATE MEASURING 6 MM X 4 MM IN ANTEROPOSTERIOR AND TRANSVERSE DIMENSIONS RESPECTIVELY.
2. SMALL SUBACROMIAL/SUBDELTOID FLUID COLLECTION.
3. SUPRASPINATUS TENDINOSIS AND MINIMAL DELTOID STRAIN. THERE IS QUESTIONABLE TENDINOSIS OF THE PROXIMAL BICEPS TENDON IN THE BICIPITAL GROOVE.
4. INFERIOR PARALABRAL CYST MEASURING 4 MM, SUGGESTIVE OF LABRAL TEAR.
5. ACROMIOCLAVICULAR JOINT HYPERTROPHIC SPURRING.

Based on this October 23 MRI, Dr. Alkire recommended “a diagnostic and operative arthroscopy, rotator cuff repair and probable distal clavicle resection.” Appellant subsequently sought the recommended surgery, the cost of all previous treatment from Dr. Alkire, attorney’s fees, and TTD benefits from August 13, 2004, through October 6, 2004.

Standard of Review

In reviewing decisions from the Workers’ Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission’s decision and affirm if that decision is supported by substantial evidence. *Rippe*

v. Delbert Hooten Logging, 100 Ark. App. 227, 266 S.W.3d 217 (2007). Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Parson v. Arkansas Methodist Hosp.*, 103 Ark. App. 178, _____ S.W.3d _____ (2008). A substantial basis exists if fair-minded persons could reach the same conclusion when considering the same facts. *Id.* The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, its decision must be affirmed. *Rippe, supra*. In making our review, we recognize that it is the Commission's function to determine the credibility of witnesses and the weight to be given their testimony. *Whitten v. Edward Trucking/Corporate Solutions*, 87 Ark. App. 112, 189 S.W.3d 82 (2004). Moreover, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*

Normally, we only review the findings of the Commission and not those of the ALJ. *Rippe, supra*. However, when the Commission adopts the conclusions of the ALJ, as it is authorized to do, we consider both the decision of the Commission and the decision of the ALJ. *Id.*

Recurrence and Aggravation Defined

In *Maverick Transportation v. Buzzard*, 69 Ark. App. 128, 130, 10 S.W.3d 467, 468 (2000), our court explained:

An aggravation is a new injury resulting from an independent incident. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence

is not a new injury but merely another period of incapacitation resulting from a previous injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. *Id.*

Recurrence

Here, the ALJ rejected the notion that appellant's need for right-shoulder surgery was a recurrence of his January 9, 2004 compensable right-shoulder injury. The ALJ reasoned that "an independent event took place on August 9, 2004, that was not a natural or probable result of the claimant's January 9, 2004 compensable injury." The ALJ reviewed appellant's testimony regarding his right-shoulder symptoms following the August 9 fall and concluded that his deposition testimony nearer in time to the August 9 fall was more probative and showed that appellant believed his symptoms worsened after the August 9 fall. In addition, the ALJ noted in his decision that

the medical evidence shows a significant change in the claimant's right shoulder after the August 9, 2004 event. The claimant had an MRI of his right shoulder on August 6, 2004, just three days before the August 9, 2004 fall in Florida. The August 6, 2004 MRI clearly says "no rotator cuff tear is seen." Then, on October 23, 2006, another MRI was done on the claimant's right shoulder which said, "high grade partial thickness tear of the distal anterior fibers of the supraspinatus at the level of the footplate measuring 6 mm x 4 mm in anteroposterior and transverse dimensions respectively."

The ALJ reasoned that it was the torn rotator cuff for which Dr. Alkire was recommending surgery; that the pre-August 9, 2004 MRI clearly showed no rotator-cuff tear; that only sometime after the first MRI did the claimant get a rotator-cuff tear; and that it was clear to the ALJ that appellant's current request for benefits was not related to a recurrence of his

January 9, 2004 compensable injury.

Aggravation

The ALJ next addressed the question of whether appellant suffered an aggravation of his January 9, 2004 compensable right-shoulder injury. Because an aggravation is a new injury with an independent cause, it must therefore meet the requirements of a compensable injury. The ALJ noted:

After reviewing the medical documentation between the August 9, 2004 fall and the second MRI of the Claimant's right shoulder on October 23, 2006, which showed a rotator cuff tear, it appears the claimant primarily had subjective complaints with no objective findings of a new injury until the October 23, 2006 MRI.

While recognizing that the October 23 MRI did show a rotator-cuff tear, the ALJ concluded that the evidence did not establish that the "injury for which Dr. Alkire recommends surgery arose out of or in the course of claimant's employment with Meyer's Bakeries on August 9, 2004." The ALJ based his finding on several factors: the delay in time between the August 9, 2004 fall and the October 23, 2006 MRI and appellant's "actions and activities therein"; the fact that appellant worked for two different employers after leaving Meyer's Bakeries (Tyson and Haliburton) but before the October 23, 2006 MRI; that both employers gave appellant a physical before he began his employment with them and appellant acknowledged not being truthful with either of them about his physical condition; and that he passed both physicals. In addition, the ALJ noted that appellant testified that the work he did for Haliburton in Iraq was more strenuous than that which he performed for either Ryder or Meyer's Bakeries; that the Haliburton work consisted of working with chains and straps, raising and lowering trailers; that appellant's left shoulder was undisputedly injured in Iraq

while working for Haliburton; that appellant gave, in the ALJ's estimation, contradictory testimony about whether any specific incident in Iraq made his right shoulder hurt worse or differently; and that for several months following his left-shoulder injury, appellant continued his work duties using mostly his right arm.

We cannot say that fair-minded persons could not reach the same conclusion reached by the Commission concerning both recurrence and aggravation. We therefore affirm the Commission's denial of benefits to appellant. In light of our decision concerning the direct appeal in this case, it is unnecessary to address Meyer's Bakeries' cross-appeal.

Affirmed.

HENRY and BROWN, JJ., agree.